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No. 97-1579

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND
UNITED WASTE SYSTEMS, INC.,
Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the
Minnesota Supreme Court

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

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MOTION OF BFI WASTE SYSTEMS OF NORTH AMERICA, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of Zenith/Kremer Waste Systems, Inc. and United Waste Systems, Inc. for a writ of certiorari to review the judgment of the Minnesota Supreme Court in this case.[1]

BFI is one of the nation's largest companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. As a collector and transporter of solid wastes, BFI is subject to solid waste "flow control" programs and requirements that were developed subsequent to and despite this

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[1] Petitioners have consented to this *amicus* brief. Counsel for Respondent Western Lake Superior Sanitary District has informed undersigned counsel of record that he does not consent to the filing of the *amicus* brief.

Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). In addition, BFI operates 99 landfills in the United States that are or can be adversely affected by the implementation of post-*Carbone* economic flow control schemes such as the one at issue in this case.

BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by Western Lake Superior Sanitary District in this case. With all due respect to the parties to this case, BFI believes that its broad, national experience and the perspective it has gained from that experience will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

Respectfully submitted,

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No. 97-1579

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND
UNITED WASTE SYSTEMS, INC.,
Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the
Minnesota Supreme Court

BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PEITIONERS

QUESTION PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the following question presented in the Petition for Writ of Certiorari:

Whether a local governmental unit may discriminate against interstate commerce in waste disposal services through the use of a fee/subsidy scheme enacted to ensure the financial success of its disposal facility, in direct conflict with *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) and *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

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INTEREST OF *AMICUS CURIAE*

BFI Waste Systems of North America, Inc. ("BFI") is one of the largest companies in the world which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical and residential solid wastes. BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). BFI has become subject to or threatened with the imposition of "economic flow control" programs, as described below, similar to the approach implemented by the Western Lake Superior Sanitary District ("WLSSD").[1]

REASONS FOR GRANTING THE WRIT

Since *Carbone* local governments have in several instances attempted to circumvent this Court's ruling by requiring solid waste haulers to sign contracts obligating them to dispose of collected wastes at designated facilities, as an alternative to denial of a necessary license or permit to operate. Similarly, some jurisdictions have mandated that waste haulers abide by "economic flow control" programs on the basis that such regimes are beyond the scope of the *Carbone* holding. This case presents an unambiguous effort to avoid the clear implications of the Court's decision. The combination of the reduced facility tip fee and the per ton waste management fee resulted in an economic mandate upon waste haulers causing materials to be delivered to the preferred site. Competition in the disposal marketplace was effectively eliminated. Other jurisdictions outside of Minnesota have taken the same approach, or are considering similar programs. Such schemes adversely affect commerce and prevent the efficient and environmentally protective disposal of solid waste.

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[1] This brief has been authored entirely by counsel for *amicus* BFI, and no other person or entity has made any monetary contribution to its preparation or submission.

I. THE WLSSD FEE/SUBSIDY SCHEME IS MERELY ONE EXAMPLE OF NUMEROUS ACTIONS UNDERTAKEN SUBSEQUENT TO THIS COURT'S HOLDING IN *CARBONE* THAT HAVE BALKANIZED THE MOVEMENT OF WASTE AND DISRUPTED IMPORTANT REGIONAL MARKETS FOR SOLID WASTE MANAGEMENT SERVICES.

In *Carbone* this Court held that a flow control ordinance adopted by Clarkstown, New York violated the Commerce Clause. By reducing the tipping fee at a facility that could no longer depend upon ordinance-mandated flow control and through the simultaneous institution of a waste management fee imposed upon property owners, lessees, and occupants, the WLSSD sought to ensure that the majority of wastes generated within its northeastern Minnesota service area would remain there, notwithstanding *Carbone*. In so doing, the District apparently concluded, and the Minnesota Supreme Court apparently agreed, that this Court's ruling was limited to instances in which the waste hauler is precluded from delivering collected materials to an out-of-state facility by a licensing ordinance. Unfortunately, the WLSSD's attempt to interpret *Carbone* in a narrow fashion, so as to justify the retention of its flow control mandates and programs, is far from an isolated case. Whether by "as enforced" or truly "bifurcated" flow control ordinances that prohibit the delivery of waste to alternative in-state facilities, de facto flow control schemes such as so-called "market participant" franchise requirements that are essentially regulatory licensing programs, or "economic flow control" programs that create no "legal" obligation to use a preferred facility yet impose an economic disincentive to go elsewhere, a number of local governments have sought to undermine the *Carbone* holding through new or modified flow control requirements. John H. Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone And Its Progeny*, 7 Vill. Envt. L.J. 203 (1996).

The decision below--particularly by ignoring the obvious protectionist purpose of the fee/subsidy scheme and the implications of this Court's ruling in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994)--will likely encourage the implementation of similar programs in other jurisdictions.[2] The petition in this case provides an opportunity for this Court to forcefully pronounce that it meant what it said in *Carbone*: flow control measures violate the Commerce Clause.

"Economic flow control" programs, such as the one at issue in this case, involve local governments that seek to achieve the same result as the ordinance invalidated in *Carbone* by reducing the "tip fee" at the "preferred" facility to below market levels, while making up the revenue difference through some form of tax or fee from a different sources. Such measures do not legally compel waste haulers to utilize the preferred facility; instead, they place economic pressure upon the haulers to do so. As several courts have recognized, economic flow control is simply ordinance flow control by another name. Both result in the same interference with protected commerce. Recent decisions in

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[2] Several jurisdictions outside the Second Circuit have contended that this Court's denials of certiorari in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) and in *USA Recycling, Inc. v. Town of Babylon, New York*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1419 (1996), immunize from Commerce Clause scrutiny franchise ordinances whose waste delivery provisions are essentially nonnegotiable, when the resulting process is virtually identical to flow control mandates created by the type of ordinance examined in *Carbone*. Unlike some franchise arrangements, in which the award is either for collection only and the hauler may choose the collection site, or combined collection/disposal franchises in which the hauler and community may negotiate which disposal site(s) is utilized, in these programs the franchisee has "no choice", and must indeed utilize a particular facility as a condition of the franchise. Likewise, some local governments have sought to condition the franchise program by requiring that a waste hauler indicate in the franchise application its "plan for disposal" or otherwise state that it will utilize a preferred disposal facility. Similarly, municipal contracts for collection or recycling have included flow control provisions in instances in which no reasonable opportunity for negotiation exists, such that the hauler has no alternative but to reject outright the contract and be deprived of the "privilege" of servicing the community. In such cases, the Commerce Clause has been violated.

the lower courts have either strongly suggested or expressly held that certain "economic flow control" measures (for example, when the community lowers the tip fee at the public landfill and institutes a "generator fee", user fee, or revenue assessment/tax to make up for the potential revenue loss) are unconstitutional. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Mid-American Waste Systems, Inc. v. Fisher*, No. C-2-94-493, slip op. (S.D. Ohio May 31, 1994); *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995); *Sanifill, Inc v. Kandiyohi County, Minn.*, 559 N.W.2d 111 (Minn. Ct. App. 1997).

The *Mid-American Waste Systems*, *Connecticut Carting* and *Kandiyohi County* decisions are instructive, in that they deal with situations in which local governments unsuccessfully attempted to avoid the reach of *Carbone* by reallocating disposal tip fees in such a way as to provide a form of "economic flow control." Kandiyohi County, Minnesota maintained, pre-*Carbone*, a designation (flow control) ordinance. After *Carbone*, the County engaged in economic flow control by converting the tip fee of $50.60 per ton at the county landfill to (a) a tip fee of $25 per ton and (b) a service (generator) fee of $25.60 per ton for waste generated within the county, regardless of the place at which it was disposed of. The Minnesota Court of Appeals upheld a state district court opinion finding that the economic flow control program violates the Commerce Clause. *Kandiyohi County* v. *Minnesota*, 559 N.W.2d 111 (Minn. Ct. App. 1997).

The Solid Waste Authority of Ohio ("SWACO"), which by resolution established a "generation fee on all in-district generated solid wastes of forty-nine dollars per ton, with disposal rates at SWACO's facilities of $0.00 per ton, and tipping fees at SWACO's three in-district solid waste transfer stations of $0.00, $0.00, and five dollars per ton", was criticized by a Federal district court for obviously attempting to avoid the direct holding of *Carbone* by ensuring flow control without directly ordering waste haulers to use a particular disposal facility. The court issued a preliminary injunction against the program, and the parties subsequently reached an out-of-court

settlement. *Mid-American Waste Systems, Inc. v. Fisher*, No. C-2-94-473, slip op. (S.D. Ohio).

East Lyme, Connecticut imposed a mandatory per-ton fee assessed against waste haulers, in order to support a put-or-pay agreement between the town and a waste-to-energy facility. The town simply converted the prior disposal charge to a tonnage fee that was calculated on the basis of the amount of waste collected by the hauler, regardless of where the waste was disposed of. A Federal district court ruled that the program was unconstitutional. *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995).

This case presented a similar factual pattern, but a different judicial result. The WLSSD maintained, pre-*Carbone*, a flow control requirement and a tip fee of $63 per ton at the designated landfill. After the petitioners threatened to pull their volumes, the District reduced the tip fee to $39.75 and evaluated a number of financing options to facilitate meeting debt service obligations for the landfill. The District selected a "management" (i.e., generator) fee of $28 per ton, payable regardless of where the hauler disposed of collected waste. Twenty-five percent of the fee, $7 per ton, was specifically designated for the financing of debt service and operating costs of the District's landfill.

The Minnesota Court of Appeals properly recognized that, with regard to the management fee, "(a)t least seven dollars of this management fee covers debt service on improvements to the Facility, thus permitting [the District] to reduce its tipping fee to below the amount necessary without the $7 subsidy from the management fee. Haulers to out-of-state landfills pay the entire management fee, but do not receive the 'rebate' that haulers to the Facility receive through the Facility's reduced tipping fee. In effect, then, at least seven dollars of the waste management fee, or a seven dollar tax, is imposed only on haulers to out-of-state landfills, and the ability of those haulers to lower their prices to compete with the Facility is impaired accordingly. . . . Here, [the District] benefits at the expense of out-of-state interests to the extent that [it] wins business from out-of-state facilities that cannot compete with [the] subsidized tipping fee." *Zenith/Kremer Waste Sys.*,

Inc. v. Western Lake Superior Sanitary Dist., 558 N.W.2d 288, 292 (Minn. Ct. App. 1997).

"Economic flow control" schemes need not always result in a situation in which the former tip fee at a preferred or designated facility is replaced, cent for cent, with a combination fee or tax and a reduced tip fee. But there is typically some economic incentive that is used that avoids true competition in the marketplace, and which acts to essentially "force" waste haulers to use a particular facility. And, as this Court is well aware, flow control measures, whether directly imposed as in *Carbone* or as implemented "through the back door", have serious, adverse consequences.

The proliferation of flow control requirements has lead to an increased number of inefficient and non-cost-effective facilities. Regional intergovernmental cooperation and the development of truly regional landfills have, for the most part, not occurred. If every municipality or county decided to site its own landfill, recyclery, and composting facility and instituted flow control measures, there would be a great misallocation of resources and an undesirable environmental outcome. In addition, flow control measures often result in a significant "takings" issue, both in the constitutional sense and from the standpoint of fairness. This issue can arise in the context of and affect both public and private facilities that are already in existence. When one jurisdiction establishes flow control, other facilities immediately have current and potential customer assets pulled away. Those customer assets could have been critical to the economic viability of the operation.

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide."[3]

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[3] National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 1-2. In addition, several of the pre- and post-*Carbone* decisions have noted the

Moreover, there is no demonstrated correlation between flow control and environmentally protective waste disposal, recycling, or processing. To the contrary,

> . . . by mandating that local waste haulers use particular management facilities, the haulers are prevented from using more environmentally sound alternatives that may exist elsewhere. The Sierra Club and other environmental groups have rightly pointed out that such regulations often inhibit the development of alternative waste management options and, in some cases, disrupt preexisting waste recovery and recycling efforts. Flow control laws unnecessarily inhibit the ability of recyclers and other ecological entrepreneurs to compete in the marketplace and provide more economical waste management options. For that reason, and because flow control has frequently been used to finance costly and inefficient incinerators, flow control is opposed by the New York Public Interest Research Group, the National Resources Defense Council, the National Wildlife Federation, Clean Water Action, and Greenpeace, among others. Those groups maintain that in practice it is likely that the environmental costs of flow control outweigh its benefits.[4]

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significant and artificial economic dislocations created by flow control mandates. *See, e.g., Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1387 (8th Cir. 1993) ($72 per ton disposal fee at designated facility, $30 at nearby facility); *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 916 (3d Cir. 1988) (flow control resulted in $100 per ton disposal charge, as opposed to rates "approximately half" at accessible facilities); *Container Corp. of Carolina v. Mecklenburg County*, No. 3:92 cv-154-MU, 1995 WL 360185 (W.D.N.C. June 22, 1992) ($37.50 per ton/$29.50 per ton).

[4] Jonathan H. Adler, *The Failure of Flow Control*, 18 Regulation, 1995, No. 2, at 11, 13

These significant economic and environmental arguments against flow control measures are clearly applicable to most flow control programs--regardless of the method by which they were created. By selecting as the designated site a facility that may not, and all-too-often does not, satisfy best available technology standards, local governments clearly have not sought to promote environmental protection through their flow control mandates. Flow control requirements are typically imposed for economic, not environmental, reasons. And, as the National Solid Wastes Management Association ("NSWMA") demonstrated in a report on flow control programs in Ohio, the requirements adopted by the state's political subdivisions have increased costs to generators and transporters of waste without providing any environmental benefit. National Solid Wastes Management Association, *The Effects of Designation and District Fees on Solid Waste Management in Ohio* (1993) at 4, 5 . The NSWMA report noted that the selection of certain landfills as "designated" flow controlled facilities means that many tons of wastes are disposed of at less than state-of-the-art facilities. Moreover, the creation of county/district flow control programs in Ohio has significantly reduced inter-county and inter-district waste movements, resulting in a balkanization of the marketplace. *Id.* at 4.

Flow control requirements are illegal, wasteful, and counterproductive. Yet they continue despite this Court's unambiguous ruling in *Carbone*. The WLSSD scheme is far from isolated--it is typical of post-*Carbone* efforts to restrict the movement of waste. Such programs and actions balkanize waste movements. They preclude the development of regional disposal solutions, in spite of the U.S. Environmental Protection Agency's view that multi-governmental regional sites are cost-effective and more likely to be managed in an environmentally protective manner.[5] The decision below threatens the national marketplace in

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[5] 56 Fed. Reg. 50,978, 50,989 (1991) (in issuing the Resource Conservation and Recovery Act ("RCRA") "Subtitle D" regulations applicable to municipal solid waste landfills, 40 C.F.R. Part 258, the Agency emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong

solid waste management by endorsing balkanizations that cannot be squared with the goals of a national economic unit, and with the particular need for the efficient, environmentally protective disposal of solid waste. The petition provides an opportunity for this Court to declare that it meant what it said in *Carbone*--flow control measures violate the Commerce Clause.

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S RULING IN *WEST LYNN CREAMERY V. HEALY.*

Some writers have suggested that this Court's decision in *West Lynn Creamery*, 512 U.S. 186 (1994), sweeps broadly over state and local "subsidies", tax incentives, and locational preferences. *See, e.g.*, Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 378 (1996); William L. Oemichen, *Milk, State Taxes, State Subsidies, and the Commerce Clause: When States Cannot Tax an Agricultural Commodity to Fund a Subsidy for its Struggling Industries*, 18 Hamline L. Rev. 415, 428-29 (1995) (the "decision places in constitutional jeopardy the ability of states to subsidize domestic industries"); Note, *Massachusetts Tax and Subsidy Scheme Violates Commerce Clause*, 48 Tax Law. 641, 653 (1995) (the opinion "cast doubt on the validity of subsidies themselves"). These commenters, and others, suggest that a wide variety of state and local subsidy and incentive programs are inconsistent with the Commerce Clause.

While the precise parameters of *West Lynn Creamery* have not been delineated by this Court, it is clear that the WLSSD's scheme clearly circumvented the notion that a tax and a subsidy may not be combined to create what is essentially a "protective tariff": "By granting a tax exemption for local products, Hawaii [in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)] in effect created a

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incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities.")

protective tariff. . . . And if a discriminatory tax rebate is unconstitutional, Massachusetts' pricing order is surely invalid; for Massachusetts not only rebates to domestic milk producers the tax paid on the sale of Massachusetts milk, but also the tax paid on the sale of milk produced elsewhere." 512 U.S. at 197.

That is precisely the economic effect of the combined fee/subsidy implemented by the WLSSD. The scheme resulted in a strong economic coercion to utilize the District's facility, given that accessing alternative in-state or out-of-state sites would involve payment of related transportation costs and disposal fees at those sites, along with the mandatory WLSSD generator fee. Only those haulers who utilized the District's facility obtained the economic benefit of the scheme--exporters were penalized because their customers were forced to pay the fee in addition to the transportation costs and tip fee imposed by the receiving facility. The adverse effect of the system--out-of-state concerns losing actual and potential business, a particular in-state facility gaining market share--was readily demonstrated by even a cursory examination of the disposal marketplace. And the scheme was hardly justified by the fact that the "subsidy" was not payable directly to private interests--such a crabbed interpretation of *West Lynn Creamery* is wildly inconsistent with this Court's prior holdings.

Moreover, as the petitioners have noted, the District simply did not create a subsidy exclusively funded from general tax revenues. Certainly, even a "pure subsidy funded out of general revenues" is permissible only to the extent that "local businesses. . . are not competing with businesses out of State." *West Lynn Creamery*, supra, 512 U.S. at 208 (Scalia, J., concurring). Here, the WLSSD specifically dedicated at least a portion of the revenues for a specific purpose: the local disposal facility. It did not possess the power to impose a tax or charge for general revenue purposes. It could only assess a fee or tax for the purpose of funding its operations and for servicing its own debt.

The combination of tax/fee and subsidy imposed by the WLSSD "violates the principle of the unitary national market by

handicapping out-of-state competitors, thus artificially encouraging in-state production. . . ." *West Lynn Creamery* at 193. The purported "nondiscriminatory" nature of the fee was, in practice, illusory. The fee, alone, did not produce the anti-competitive effect. What caused the effect was the combination of the fee with the reduced tip fee at the preferred facility. The mandatory nature of the District fee--clearly an act of governmental regulation--when coupled with the reduced tip fee made the WLSSD either "whole" or in better economic condition by undercutting disposal-related charges at other accessible facilities. Both aspects of the program worked together to produce the discriminatory effect. Neither, alone, would have been successful.

In addition, the scheme was infected with protectionist motivation. A state or local measure that discriminates against commerce "either on its face **or in practical effect**" is subject to a strict standard--the discriminatory measure can survive only if it serves a legitimate local purpose and is the least discriminatory alternative to achieve local goals. *Hughes v. Oklahoma*, 441 U.S. 332 (1979); *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute. . .discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry"). Moreover, this Court has also determined that a state or local measure that demonstrates "simple economic protectionism" (i.e., protectionist intent) is also subject to a "virtually per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) at 623-24. If discriminatory intent is shown, a litigant may argue that per se scrutiny, and not *Pike* balancing, is applicable--even if the measure is worded in an "even-handed" fashion.[6] *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977). By holding that the *Pike* test should govern its analysis, the court below failed to give credence to record evidence of protectionist intent, as well as the Minnesota Court of Appeal's express holding that the scheme was infected with impermissible motivation.

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[6] *Pike v. Bruce Church, Inc.*, 397 U.S. 617 (1970).

Even seemingly nondiscriminatory measures have been invalidated pursuant to the more rigorous "virtually per se" test enunciated in *Philadelphia v. New Jersey* and a host of other decisions. Protectionist intent or motivation is, itself, "economic protectionism" and grounds for invalidation of a measure, even if the governmental act is not facially discriminatory. Indeed, a finding of protectionist purpose, motivation, or effect is fatal. *See, e.g., Healy v. The Beer Institute, Inc.*, 109 S. Ct. 2491 (1989) (invalidating a Connecticut beer pricing affirmation statute as "just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.") Statutes that evidence protectionism are invalid, even if they neither facially discriminate nor impose, in fact, a disproportionate burden on interstate commerce. *See also Bradley v. Public Utilities Commission*, 289 U.S. 92, 95 (1933); *Buck v. Kuykendall*, 267 U.S. 307, 315 (1927). *Carbone* and its progeny are likewise consistent with the long-held maxim that isolationist or protectionist measures are "impermissible under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 685 (Brennan, J., concurring) (emphasis included).

The overall purpose of the Commerce Clause is, of course, to preclude economic isolation and balkanization. *See, e.g., Hughes v. Oklahoma*, supra, 441 U.S. at 325-26 (1979) (the avoidance of "economic Balkanization" was the "central concern" of the framers); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1110-15 (1986); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1140 (1978). The WLSSD has, in essence, deliberately created a scheme that tolerates the formal existence of waste exportation to other jurisdictions but seeks to ensure that waste haulers can not, as a practical matter, deliver wastes to any facility other than its own. In implementing this system, the District expressly anticipated that the substantial majority of collected waste volumes would remain subject to the flow control system. By ignoring that evidence, the Minnesota Supreme Court also ignored this Court's precedents.

III. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES.

All political subdivisions of all of the states of our Union depend upon open borders and a national economy that imposes both benefits and burdens. The Commerce Clause serves to ensure that those borders remain open, and that they not be closed as to some commodities, while open for others. The localities within which the WLSSD operates have, obviously, made no effort to preclude the importation of seemingly desirable foodstuffs, manufactured goods, service equipment, etc., or the export of other locally-produced goods for sale elsewhere, but for purely economic reasons the District seeks to prohibit the export of a single commodity--waste.

The post-*Carbone* efforts to retain existing and impose new flow control mandates and programs despite this Court's ruling are reminiscent of other regrettable episodes in our Nation's history. The authority and duty of this Court to intervene are clear. In the absence of the Court's intercession, political subdivisions and waste management authorities will engage in an unnecessary and counterproductive war of retaliation--as jurisdictions whose economies are disadvantaged, due to the loss of imported waste volumes, act in kind by precluding the export of their wastes. Very real safety and health threats will result from continued reliance upon older, often substandard disposal sites. The goals of the Congress in enacting RCRA and of the EPA in promulgating the Subtitle D rules will be ill served.

Restrictions on the movement of waste--whether imposed directly or, as here, through the "back door"--affect, indeed, substantially so, the national marketplace by artificially distinguishing between "waste" materials and the open borders that facilitated the transportation, importation, purchase, and consumption of the "original" materials. They deprive companies such as BFI, as well as

governments who construct or expand state-of-the-art facilities, the ability to make meaningful long-term investments in disposal capacity and transportation vehicles. They disrupt regional intergovernmental efforts to improve the efficiency and environmental protectiveness of waste disposal. They artificially and dramatically increase the costs of solid waste management. And, perhaps most importantly, they constitute deliberate efforts to circumvent the goals of the Commerce Clause and this Court's numerous opinions. Review by this Court is necessary to ensure that the Commerce Clause's vital role in protecting a truly national economy is not diminished.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one which impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in *Carbone*, local governments have continued their efforts to create protectionist schemes that thwart the free flow of commerce. The extent of those ongoing disputes, the significance of the environmental and economic interests implicated, and the need for clear and unequivocal guidance on these issues from this Court all support the grant of certiorari.

Respectfully submitted,
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